

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	No. 08 CR 50013
)	Judge Philip G. Reinhard
ROBERT JOHNSON)	

**UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS
COUNT TWO OF THE INDICTMENT**

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, responds to the Defendant's Motion to Dismiss Count Two of the Indictment. For the reasons set forth below, the United States opposes the defendant's motion to dismiss.

Defendant essentially argues that the offense as stated in Count Two of the indictment fails to state an offense because elk are not "wildlife" as defined by the Illinois Wildlife Code. Br1-3. Defendant's motion should be denied because Count Two sufficiently alleges that defendants transportation of elk in violation of the laws and regulations of the State of Illinois. The Illinois Wildlife Code authorizes the Illinois Department of Natural Resources to make rules and regulations for carrying out, administering and enforcing the provisions of the Illinois Wildlife Code. 520 ILCS 5/1.4. The Illinois Administrative Code contains regulations regarding the importation of elk into the State of Illinois and requires that individuals transporting elk into the State of Illinois comply with the provisions of the Illinois Wildlife Code including the requirements of 520 ILCS 5/2.2. Therefore, defendant's argument that elk are not covered by the Illinois Wildlife Code because they are "domestic" not "wild" animals

and that Count Two of the indictment should be dismissed lacks merit and should be denied.

The Illinois Wildlife Code provides that the Department of Natural Resources is authorized to make rules and regulations for carrying out, administering and enforcing the provisions of the Illinois Wildlife Code. 520 ILCS 5/1.4. Once such rules are promulgated in accordance with the Illinois Administrative Procedure Act and become effective, they are enforced in the same manner as any other provisions of the Illinois Wildlife Code and violators of the rules are subject to the same penalties that are set forth in the Illinois Wildlife Code. *Id.*

Title 8, Illinois Administrative Code, Section 85.120, a copy of which is attached hereto as Government Exhibit 1, imposes regulations regarding the importation of elk into the State of Illinois. Section 85.120(a) imposes the requirement that all elk entering Illinois shall originate from a brucellosis-free herd or be negative to specific brucellosis tests 60 days prior to their entry into the State of Illinois. Sections 85.120(b) through (h) impose additional requirements for the transportation of cervids into the State of Illinois. Title 17, Illinois Administrative Code, Section 635.10 defines cervids as all members of the family Cervidae, which includes deer, moose, elk and caribou. In order to import Cervids into Illinois, the individual transporting the cervids must obtain a Illinois Department of Agriculture permit and have a certificate of veterinary inspection that demonstrates that the cervids have been tested for tuberculosis ("TB") and brucellosis in accordance with State of Illinois standards. 8 IL

ADC 85.120(d). In addition, under the regulations, all Cervidae entering Illinois must also be in compliance with the Illinois Wildlife Code (520 ILCS 5).

520 Illinois Compiled Statutes 5/2.2 states, in relevant part, that “[i]t shall be unlawful for any person to bring into the State of Illinois for the purpose of holding, releasing, propagating, or selling any other living wild animal not covered by this Act without first obtaining a permit from the Director (of the Illinois Department of Agriculture). This permit shall only be granted upon satisfactory proof that the specific animals intended to be imported are free of communicable disease at the time of importation, will not become a nuisance, and will not cause damage to existing wild or domestic species.”

The Illinois Department of Natural Resources has promulgated regulations regarding the transportation of elk which require that the transportation of the elk be in compliance with the Illinois Wildlife Code which includes 520 ILCS 5/2.2. Therefore, Count Two sufficiently alleges a violation of the Lacey Act, Title 16, United States Code, §§ 3372(a)(2)(A) and 3373(d)(1)(B) when it alleges that defendant transported elk in violation of the laws and regulations of the State of Illinois, specifically, 520 Illinois Compiled Statutes 5/2.2. Therefore, defendant’s motion to dismiss Count Two of the indictment should be denied.

Conclusion

For the reasons cited above, the government asks that the court deny defendant's Motion to Dismiss Count Two of the Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

**UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS
COUNT TWO OF THE INDICTMENT**

was served on August 20, 2008, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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Westlaw.

8 IL ADC 85.120

8 Ill. Adm. Code 85.120

Ill. Admin. Code tit. 8, § 85.120

Page 1

C

**WEST'S ILLINOIS ADMINISTRATIVE CODE
TITLE 8. AGRICULTURE AND ANIMALS
CHAPTER I. DEPARTMENT OF AGRICULTURE
SUBCHAPTER B: ANIMALS AND ANIMAL PRODUCTS (EXCEPT MEAT AND POULTRY
INSPECTION ACT REGULATIONS)
PART 85: DISEASED ANIMALS**

Current with amendments received through August 22, 2008.

15.120 Cervidae

a) Elk entering Illinois shall originate from a certified brucellosis-free herd or be negative to a brucellosis card test or PCFIA test conducted within 60 days prior to entry on all animals 6 months of age and over.

b) Certified brucellosis-free cervid herds shall be established and maintained in accordance with the Brucellosis Uniform Methods and Rules as approved by the United States Animal Health Association (P.O. Box K227, Suite 114, 1610 Forest Avenue, Richmond, Virginia 23228; September 30, 2003 and not including any later amendments or editions beyond the date specified) and the USDA.

c) All cervidae entering Illinois must also be in compliance with the Illinois Wildlife Code [520 ILCS 5].

d) All cervidae entering Illinois must be accompanied by a permit from the Department and Certificate of Veterinary Inspection that:

1) has been issued by an accredited veterinarian of the state of origin or a veterinarian in the employ of the United States Department of Agriculture;

2) is approved by the Animal Health Official of the state of origin;

3) shows that the cervidae are free from visible evidence of any contagious, infectious, or communicable disease or exposure thereto, do not originate from a CWD endemic area (any county and surrounding counties where CWD has been diagnosed in the past five years);

4) shows that the cervidae are not originating from a herd under quarantine for any contagious, infectious or communicable disease;

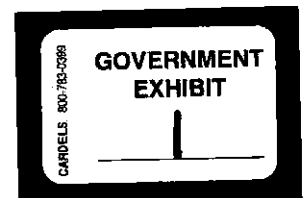
5) shows that the animals originate from a herd that has been monitored for at least 5 years under a state-approved CWD certification program or originate from a herd that meets the following criteria:

A) Any additions to the herd are natural additions or have been in the herd for at least one year;

B) Complete herd records, including records of purchases, deaths and causes of deaths are maintained for at least five years;

C) The herd has been under veterinary supervision for a minimum of 5 years;

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8 IL ADC 85.120
8 Ill. Adm. Code 85.120
Ill. Admin. Code tit. 8, § 85.120

Page 2

- D) The animals have not been exposed to any animal from a herd diagnosed with CWD in the past five years;
 - E) Contains a statement by the veterinarian for the herd of origin certifying that the herd has been under veterinary supervision for a minimum of 5 years and has had no exposure to any cervid from a CWD trace-back or trace-forward herd; and
 - F) Contains a statement signed by the owner certifying that all statements on the certificate of veterinary inspection are correct.
- 6) lists the cervid's unique individual identification (approved ear tag, tattoo or microchip);
- 7) shows the permit obtained from the Department:
- A) Applicant for permit shall furnish the following information to the Department:
 - i) Name and post office mailing address of Illinois destination;
 - ii) Name and post office mailing address of consignor and/or source herds;
 - iii) Number and unique identification of cervidae in shipment;
 - iv) Anniversary date and herd certification number of the source herds; and
 - v) Name and telephone number of the herd veterinarian of the source herds.
 - B) Grounds for refusal to issue permit are:
 - i) Violation of the Act or this Part;
 - ii) Presence of a disease that might endanger the Illinois livestock industry;
 - iii) Refusal to provide required information for the permit.
 - C) Permits will be issued by telephoning or writing the Department.
- e) Chronic wasting disease (CWD)
- 1) Any cervid dying from an unknown cause and that has exhibited a neurological disorder must have its brain removed for CWD evaluation. Any cervid exhibiting symptoms of CWD must be kept separate and apart from other members of the herd and will be quarantined until the animal is either destroyed or determined not to have CWD. Animals quarantined for CWD will be subject to periodic inspection by Department personnel.
 - 2) If CWD is diagnosed in a herd, the herd will be quarantined and a herd plan developed. The quarantine will remain in effect until either the herd has been depopulated or there has been no evidence of CWD in the herd for five years from the date of the last case, and all animals that have died or have been slaughtered in the herd during that period were examined for CWD.
 - 3) If a herd received an animal from an affected herd within 36 months prior to the death of the affected an-

8 IL ADC 85.120

Page 3

8 Ill. Adm. Code 85.120

Ill. Admin. Code tit. 8, § 85.120

imal, the trace-forward herd has two options:

- A) The animal from the affected herd shall be removed and examined for CWD. If the animal is positive, the herd shall be placed under quarantine for at least five years, and a herd plan shall be developed. If the animal is negative, a herd plan shall be developed which includes a five year surveillance of the herd, with the mandatory reporting of the death of all animals and CWD examination.
 - B) If the trace-forward animal is not removed, the herd will be quarantined and a herd plan developed. The herd will be under quarantine for five years, unless the herd was participating in the Certified Monitored Chronic Wasting Disease program. Any surveillance done after the arrival of the trace animal will be counted as time in quarantine.
- 4) If an animal dies of CWD within 36 months after changing herds, the herd of origin shall be considered as the trace-back herd. A herd plan will be developed, including a herd inventory with individual animal identification, verified by an accredited, state or federal veterinarian. The herd will be quarantined for five years from the last case traced back to the herd with mandatory death reporting and CWD testing of all animals.
- 5) For cervidae changing ownership or moving within the State, the owner must obtain a permit issued by the Department prior to movement and originate from a herd that is enrolled in the Certified Monitored Chronic Wasting Disease (CWD) Program or the Contained Monitored Chronic Wasting Disease Program. The permit may be obtained no more than 72 hours in advance of the movement of the cervids by providing the following information:
- A) Name and complete mailing address of person selling the cervids;
 - B) Certified Monitored Chronic Wasting Disease or Contained Monitored Chronic Wasting Disease Herd number;
 - C) Name and complete mailing address of person purchasing the cervids; and
 - D) Number of animals and unique identification of the animals.
- 6) For cervidae entering Illinois for immediate slaughter, the owner must:
- A) Notify the Department at least seven days prior to shipment providing the Department with the number of animals to be slaughtered and the name and address of the slaughter facility; and
 - B) Obtain a permit from the Department no more than 72 hours in advance of shipment confirming the name of the slaughter facility, the date the animals will be shipped, and the individual identification number for each animal.
- 7) Grounds for refusal to issue permit are:
- A) Violation of the Act or this Part;
 - B) Presence of a disease that might endanger the Illinois livestock industry; and
 - C) Refusal to provide required information for the permit.

8 IL ADC 85.120
8 Ill. Adm. Code 85.120
Ill. Admin. Code tit. 8, § 85.120

Page 4

8) Permits may be requested by telephone or writing the Department.

f) Requirements for Establishing and Maintaining Certified Monitored Chronic Wasting Disease (CWD) Herds

1) General requirements

A) Certificates for Certified Monitored and Certified CWD Herds shall be valid for one year, unless revoked due to disclosure of CWD in the herd, and shall be issued by the Department.

B) Certificates shall be extended for a period of one year upon compliance with recertification requirements.

C) All animals shall be individually identified with an approved tag, microchip or tattoo. Elk are required to have two official/approved unique identifiers.

2) To qualify or renew a herd for certification

A) An annual herd inventory must be completed and verified by an accredited veterinarian, or a state or federal veterinarian or animal health investigator, or an authorized representative of the Illinois Department of Natural Resources, within 9-15 months from the anniversary date of the enrollment of the herd in the program. The inventory must include:

i) Unique identification, age and sex of all animals in the herd;

ii) Disposition of all animals not present;

iii) Source of purchased additions;

iv) Documentation of all interstate movement; and

v) Signature of both the owner and the person verifying the inventory.

B) The owner must:

i) Submit the brains of all animals 16 months of age or older that have died or been killed or slaughtered for CWD examination at an approved laboratory;

ii) Individually identify all animals with a unique identification; and

iii) Provide a detailed description of the physical facilities and the specific premises location of the herd either through GPS identification or through a detailed description of the location.

3) Levels of certification

A) The Department will issue certification of herd monitoring upon completion of the annual herd inventory and review by the Department.

B) Herds will be certified as follows:

8 IL ADC 85.120

8 Ill. Adm. Code 85.120

Ill. Admin. Code tit. 8, § 85.120

Page 5

- i) Monitored Herd, followed by number of years of participation ; and
 - ii) Certified Herd, followed by number of years of participation. A herd will be certified at the end of five years of participation.
- 4) Herd additions are allowed under the following circumstances:
- A) Animals may enter the herd from herds of equal or higher status; and
 - B) Animals entering the herd from a herd of lower status will result in the herd's level reverting to the level of the purchased animals.
- g) Requirements for Establishing and Maintaining Contained Monitored Chronic Wasting Disease (CWD) Herds
- 1) General requirements
 - A) Certification for Contained Monitored CWD Herds shall be valid for one year, unless revoked due to disclosure of CWD in the herd, and shall be issued by the Department.
 - B) Certification shall be extended for a period of one year upon compliance with recertification requirements.
 - C) All animals being purchased or sold shall be individually identified with an approved tag, microchip or tattoo.
 - 2) To qualify or renew a herd for certification
 - A) An annual herd inventory must be completed and verified by an accredited veterinarian, or a state or federal veterinarian or animal health investigator, or an authorized representative of the Illinois Department of Natural Resources, within 9-15 months from the anniversary date of the enrollment of the herd in the program. The inventory must include:
 - i) Approximate number of animals in herd;
 - ii) Disposition of all animals not present;
 - iii) Source of purchased additions;
 - iv) Documentation of all interstate movement; and
 - v) Signature of both the owner and the person verifying the inventory.
 - B) The owner must:
 - i) Submit the brains of all animals 16 months of age or older that have died or been killed or slaughtered for CWD examination at an approved laboratory;
 - ii) Individually identify all animals entering or leaving the herd with a unique identification; and

8 IL ADC 85.120
8 Ill. Adm. Code 85.120
Ill. Admin. Code tit. 8, § 85.120

Page 6

- iii) Provide a detailed description of the physical facilities and the specific premises location of the herd either through GPS identification or through a detailed description of the location.

3) Levels of certification

- A) The Department will issue certification of contained monitoring herd status upon completion of the annual herd inventory and review by the Department.

B) Herds will be classified as follows:

- i) Monitored Herd, followed by number of years of participation; and
- ii) Certified Herd, followed by number of years of participation. A herd will be certified at the end of five years of participation.

4) Herd additions are allowed under the following circumstances:

- A) Animals must be individually identified;
- B) Animals may enter the herd from herds of equal or higher status; and
- C) Animals entering the herd from a herd of lower status will result in the herd's level reverting to the level of the purchased animals.
- h) For cervids entering or moving within Illinois for slaughter purposes, the owner must contact the Department for a permit to move the animals, providing the Department with the individual identification of each animal to be slaughtered, the owner's name and mailing address, and the name and address of the slaughter facility.

(Source: Amended at 30 Ill. Reg. 16582, effective October 9, 2006)

<General Materials (GM) - References, Annotations, or Tables>

8 ILAC § 85.120, 8 IL ADC 85.120

8 IL ADC 85.120
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